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IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICI CURIAE* BRADY CENTER TO PREVENT GUN VIOLENCE, EDUCATIONAL FUND TO STOP GUN VIOLENCE, AND LEGAL COMMUNITY AGAINST VIOLENCE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the District Court clearly erred in finding that Petitioner failed to meet its burden of showing that the disclosure of individual names and addresses in the Firearms Trace Database and the Multiple Sales Database would constitute an unwarranted invasion of personal privacy within the meaning of Exemption 7(C) of the Freedom of Information Act.

2. Whether the District Court clearly erred in finding that Petitioner failed to meet its burden of showing that the disclosure of certain data from the Firearms Trace Database could reasonably be expected to interfere with ongoing law enforcement investigations, within the meaning of Exemption 7(A) of the Freedom of Information Act.

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INTEREST OF THE *AMICI CURIAE*[1]

1. Founded in 1983, the Brady Center to Prevent Gun Violence ("Brady Center") is a national non-profit public interest organization dedicated to reducing gun deaths and injuries through education, research, and legal advocacy. A major focus of the Brady Center's activity has been to encourage the aggressive use of federal regulatory power through Petitioner Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to reduce the flow of guns into the illegal market. For example, the Brady Center successfully urged ATF to reform its gun dealer licensing system to make ATF's dealer auditing and enforcement activities more effective. In addition, the Brady Center's research department has performed pioneering empirical research using data like the ATF trace data at issue in this case to better understand interstate crime gun trafficking patterns and the effect of specific legislative initiatives on those patterns. *See, e.g.*, Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (June 12, 1996). The Brady Center (under its previous name, the Center to Prevent Handgun Violence) also brought a successful Freedom of Information Act ("FOIA") case, relied upon by the lower courts in this case, seeking disclosure of ATF data. *See Center to Prevent Handgun Violence* v. *Department of Treasury*, 981 F. Supp. 20 (D.D.C. 1997). The Brady Center currently has a FOIA case pending in the federal District Court for the District of Columbia, seeking disclosure of much of the same information sought by Respondent City of Chicago. *See Brady Center to Prevent Gun Vio-*

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[1] In compliance with Rule 37.6 of this Court, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

lence v. *Department of Treasury*, No. 1:02-cv-00316 (RMC) (D.D.C.). Finally, through its Legal Action Project, the Brady Center has appeared in numerous cases as *amicus curiae* defending statutes and regulations related to guns.[2]

2. The Educational Fund to Stop Gun Violence ("Educational Fund") was founded in 1978 as a non-profit educational charity dedicated to ending violence, particularly that affecting children, caused by the use of firearms. The Educational Fund is a leading national organization that educates the general public and policymakers about the threats of gun violence, participates in youth violence prevention initiatives, and engages in legal advocacy on behalf of the victims of gun violence. The Educational Fund has extensive experience and expertise in matters pertaining to handguns and has filed *amicus curiae* briefs in other cases involving firearms issues.

3. Legal Community Against Violence ("LCAV") is a gun violence prevention organization, staffed principally by lawyers, that was founded in 1993 in response to the assault weapon massacre at 101 California Street in San Francisco. By making legal information and expertise easily available, LCAV empowers communities to take violence prevention measures that are effective and appropriate. LCAV's Firearms Law Center provides free, nationwide assistance to communities, groups, and individuals seeking effective, constitutional firearms regulations. The Center's services include legal research and analysis, regulatory policy development,

[2] For example, in *Springfield, Inc.* v. *Buckles*, 292 F.3d 813 (D.C. Cir. 2002), the Brady Center filed an *amicus curiae* brief supporting the successful defense of ATF's ban on the importation of semi-automatic rifles with high-capacity ammunition magazines. The Brady Center also has filed *amicus curiae* briefs in cases in this Court involving constitutional challenges to gun laws, including *Printz* v. *United States*, 521 U.S. 898 (1997); *United States* v. *Lopez*, 514 U.S. 549 (1995); and *Farmer* v. *Higgins*, 498 U.S. 1047 (1991).

legal assistance, educational outreach, and legal support for local firearms ordinances.

STATEMENT

1. ATF's role in preventing gun trafficking and enforcing gun laws is crucial to public health and safety. On an average day in the United States, 93 people die from gunshot wounds and hundreds of others sustain non-fatal gunshot injuries.[3] More than 500,000 violent crimes are committed with guns in this country each year, including almost 11,000 homicides.[4] The threat posed to young people by gun violence is especially severe, as a teenager in the United States is more likely to die of a gunshot wound than from all natural causes combined. In addition to the incalculable human suffering, gunshot wounds account for approximately $40 billion in medical and other costs each year.[5]

This epidemic of gun violence is fueled by the availability of guns to juveniles, convicted criminals, and others who are legally prohibited from possessing them. Each year, tens of thousands of guns are diverted from lawful commerce to the illegal market through gun trafficking.[6] Many studies

[3] *See* Centers for Disease Control, *National Vital Statistics Reports, Deaths: Final Data for 2000*, vol. 50, no. 15, at 69 (Sept. 16, 2002) ("*National Vital Statistics*"), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_15.pdf; Department of Justice, *Promising Strategies to Reduce Gun Violence* xiii (1999) ("*Promising Strategies*"), *available at* http://ojjdp.ncjrs.org/pubs/gun_violence/contents.html.

[4] *See* Bureau of Justice Statistics, *National Crime Victimization Survey: Criminal Victimization 2001*, at 8 (Sept. 2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv01.pdf; *National Vital Statistics Report* at 69.

[5] *See* Department of Justice, *Promising Strategies*, at xiii.

[6] *See, e.g.*, Bureau of Alcohol, Tobacco & Firearms, *Following the Gun: Enforcing Federal Laws against Firearms Traffickers* ix (June 2000) ("*Following the Gun*"), *available at* http://www.atf.treas.gov/pub/fire-explo_pub/pdf/followingthegun_internet.pdf.

produced or commissioned by ATF have shown that illegally trafficked guns are frequently used in crimes.[7] Because licensed gun dealers have access to a large supply of guns, they represent a significant gun trafficking threat and a danger to public safety if they violate the law.[8] As a result, ATF's role in enforcing these regulatory provisions and in monitoring Federal Firearms Licensees ("FFLs") is essential to public safety.

2. Each year ATF processes more than 200,000 trace requests received from more than 17,000 law enforcement agencies. J.A. 24. To respond to these trace requests, ATF obtains information about the acquisition and disposition of a gun from FFLs and catalogs that information in the Trace Database. J.A. 22-24.

The Trace Database purportedly contains some 300 fields for data, J.A. 31, although not every field is populated. A number of the 300 fields are dedicated to administrative record-keeping (including name and time of data entry) and some special law enforcement codes. J.A. 84, 215-219. Prominent among these codes is the "do not contact" code, which indicates that ATF should not contact the dealer in the tracing process because that dealer itself is under investigation. J.A. 88-90, 212-215. Respondent did not request any data relating to any of these investigative or administrative codes, including the "do not contact" code. J.A. 84, 88-90, 212-215. In fact, Respondent did not request any data from traces coded "do not contact." *See* Pet. App. 9a. Conse-

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[7] *See, e.g.*, Bureau of Alcohol, Tobacco & Firearms, *Commerce in Firearms in the United States* 19 (Feb. 2000), *available at* http://www.atf.treas.gov/pub/fire-explo_pub/020400report.pdf ("*Commerce in Firearms*"); Bureau of Alcohol, Tobacco & Firearms, *Gun Shows: Brady Checks and Crime Gun Traces* 7 & Table 4 (Jan. 1999), *available at* http://www.atf.treas.gov/pub/treas_pub/gun_show.pdf.

[8] *See* ATF, *Commerce in Firearms* at 19; *see also* ATF, *Following the Gun* at x.

quently, affirmance of the Court of Appeals will not result in the release of any of this potentially sensitive information.

In this case, ATF refused to release any current information from the Trace Database, claiming that such a release would interfere with ongoing law enforcement investigations in contravention of FOIA Exemption 7(A). ATF thus withholds *all* information in the Trace Database for 14-26 months.[9] Further, ATF withholds several of the most important fields of information for more than five years,[10] again claiming Exemption 7(A). These fields include:

- Information identifying the requesting agency, including: (1) the code number assigned to that agency (the "ORI Code"); (2) agency name; and (3) agency contact information (street, city, zip, phone number);
- Information associated with the FFLs that manufactured, sold, or imported the gun, including: (1) the full FFL numbers (a FFL number is a unique identifier assigned to each FFL); (2) "Invalid FFL" (associated with a governmental seller) numbers and contact information (street, city, zip, phone number); and (3) importer information;

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[9] Although Petitioner refers to a "one year" withholding period, Pet. Br. 8; *see also* J.A. 32-33, all information is actually withheld for 14-26 months. For example, ATF did not release 2000 data from the Trace Database until February 15, 2002—a withholding of between fourteen months (December 2000) and twenty-six months (January 2000). ATF would respond to any FOIA request from February 15, 2002 to February 14, 2003 with an identical computer disk of data.

[10] ATF's "five-year" withholding policy withholds data more than 5 1/2 years on average. For example, ATF's February 15, 2002 release included data from 1996 for the data elements withheld for "five years." This data was between 5 years and 2 months old and 6 years and 2 months old when released. For the Court's convenience, we nevertheless adopt the practice of referring to a "five-year" withholding policy.

- Gun serial number if the gun was involved in a multiple sale (defined as the sale of two or more handguns to an unlicensed purchaser within five consecutive business days);
- Date of purchase.

J.A. 34; Pet. Br. 8-9.[11]

3. ATF formerly released this data, making the same type of trace data that it is now withholding from Respondent available to: (1) the Atlanta Journal-Constitution, *see* J.A. 79 ("In or about 1989, ATF provided the Atlanta Journal-Constitution with a hard-copy of all of its gun traces."); and (2) the National Rifle Association ("NRA"), *see* J.A. 76-77, 93-101 (stating that the NRA was allowed to view the entire Trace Database, except for the investigative fields, and even run queries in the Trace Database); *see also* J.A. 99-100 (indicating that the NRA also downloaded the entire database of records of out-of-business gun dealers).

Further, in March 1995 ATF released information from the Trace Database to the Brady Center's research director in response to a FOIA request—and withheld only gun serial numbers from traces that had occurred during the previous year. *See* Weil & Knox, 275 JAMA at 1759. The Brady Center's researchers then used this important data to produce

[11] Petitioner refers to these as "Nine of the 300-plus data elements in the Trace Database," Pet. Br. 8, but that misleads by undercounting the data elements withheld and overcounting the data elements released. How the claim that "nine" data elements undercounts is demonstrated by referring to the record layout pages that ATF provides to FOIA requestors along with its standard computer disk. Those pages show, for example, that "Invalid FFL" (one of ATF's "nine" items withheld, Pet. Br. at 9) consumes at least nine data elements all by itself: license name, business name, street number, street direction, street name, street suffix, city, zip, and phone number. The claim "300-plus" data elements overcounts because it ignores the fact that several fields have neither been requested nor released, are unpopulated, or contain no useful information (such as the time the entry was made in the database). J.A. 84, 88-90, 212-215.

a prominent peer-reviewed article[12] evaluating a new Virginia gun law. *See id.* at 1761.

As justification for its recent refusal to release raw data from the Trace Database, ATF now professes concern about the public or press contacting suspicious dealers. However, this concern is belied by the fact that ATF itself has, in the past, issued several public reports identifying the names of dealers who are the sources of large numbers of traced guns. *See, e.g., A Study of Firearms Involved in Crimes in the Tucson Metropolitan Area: June 1994 Through July 1995* (prepared by the Phoenix Field Division of ATF) ("*Tucson Study*") (naming gun dealers that were the source of three or more guns traced to crime in the Tucson area); *Project Lead, Washington, D.C.: January 1 Through December 31, 1994* (prepared by the Washington, D.C. Field Division of ATF) ("*Project Lead*") (identifying by name the sixteen leading licensed gun dealers in Virginia and Maryland that were the source of guns traced to crime in Washington, D.C.). Further, the names, addresses, and phone numbers of all FFLs, except collectors of curios and relics, are not secret, as ATF regularly makes them available to the public. *See* http://www.atf.treas.gov/firearms/ffl/index.htm.

ATF adopted its current five-year withholding policy sometime after 1995. In light of the fact that the trace data has proven so beneficial for studies such as the Weil & Knox article, one would expect that ATF's policy change would be based upon a detailed rationale. But ATF neither enumerated any harm from its previous releases of trace data nor offered a coherent justification for the change. ATF has not pointed to even one investigation that has been jeopardized by the

[12] *See, e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277, 302 (2001) (citing the Weil & Knox article as "the most prominent" use of trace data for policy evaluation).

release of trace data. *Cf.* J.A. 85 (former supervisor of ATF's National Tracing Center confirmed that he did "not recall any investigations or prosecution either by ATF or a state or local law enforcement agency that was damaged or adversely affected by the disclosure of information from the [Trace Database]"). It did not even base its new secrecy policy on any studies of *potential* harms, as confirmed by the testimony of ATF's witness. *See* J.A. at 168 ("THE COURT: . . . You are speculating. I mean, no studies have been done? A[nswer]: Correct, no studies have been done."). In fact, the only rationale that ATF has offered for its new policy is "the statute of limitations for the [federal] Gun Control Act," J.A. at 170, which, as shown below, bears no relationship to the length of ongoing federal or local investigations pertaining to trace data.

4. Researchers and gun violence prevention advocates at groups like the Brady Center, the Educational Fund, and LCAV need the information formerly released by ATF to conduct analysis and research on forms, patterns, and indicators of gun trafficking and the diversion of guns to illegal markets, prohibited purchasers, and criminal use. This analysis and research will open to public scrutiny ATF's performance of its statutory duties and help ATF, legislators, and the public determine whether ATF is employing the most efficient and successful methods and allocating the proper resources to enforce the country's gun laws and to curtail illegal gun trafficking.

The data fields that ATF currently withholds for more than five years under the guise of Exemption 7(A) include: (a) requesting agency information; (b) FFL information; (c) gun serial numbers; and (d) date of retail purchase.

a. Requesting agency information is important because it reveals whether local law enforcement agencies effectively use their tracing capabilities. ATF encourages communities to submit one hundred percent of guns recovered in crimes for tracing. Complete tracing allows for more precise data

analysis to detect patterns of gun trafficking within communities and nationwide. The results from such complete tracing have shown that gun traffickers often transport large numbers of illegal firearms into the nation's urban centers, which traditionally have strict laws regulating the sale of firearms. For example, 73.4 percent of the crime guns recovered in New York City came from out-of-state sources (including Virginia, North Carolina, Georgia, and Florida). Bureau of Alcohol, Tobacco & Firearms, The Youth Crime Gun Interdiction Initiative, *Crime Gun Trace Reports (2000): National Report* (July 2002) at xii, *available at* http:// www.atf.treas.gov/ firearms/ ycgii/ 2000/ index.htm ("*YCGII 2000*"). Such information is instructive not only about the laws and enforcement in New York City, but also regarding the laws and enforcement in those states supplying the crime guns.

b. ATF withholds full FFL numbers for more than five years. As ATF itself has identified, a small number of dealers account for a large proportion of the guns traced from crimes. In 1998, 1.2 percent of dealers accounted for more than 57 percent of the crime guns traced to current dealers, and 0.4 percent of dealers accounted for more than 39 percent of the crime guns. *See* ATF, *Commerce in Firearms* at 23-24. Independent research confirms this heavy concentration of traces to a small number of dealers. Using information from the Trace Database that ATF is now withholding from Respondent, one researcher determined that 0.7 percent of FFLs in California accounted for 53.6 percent of all handgun traces in 1998 in that state. *See* Garen J. Wintemute, Research Letter, *Relationship Between Illegal Use of Handguns and Handgun Sales Volume*, 284 JAMA 566, 567 (2000). This research proved that sales volume was not the only factor in the number of traces to a current dealer, because some dealers were associated with more handgun traces than would be predicted by their sales volume. The study concluded that focused monitoring of those dealers by law enforcement "could decrease the incidence of handgun violence" by re-

ducing gun trafficking. *Id.* This is the kind of study that *amici* could perform if ATF were to release FFL identification. ATF's current withholding policy unreasonably deprives the public of access to the raw data necessary for determining how well ATF is meeting its statutory duty of monitoring dealers.

Dealer information will also aid the public and legislators in making informed policy judgments. For example, as mentioned above, the Brady Center's research director obtained dealer and purchase date information (both now withheld by ATF) from a March 1995 FOIA request. This information was used to demonstrate that Virginia's law restricting handgun purchases to one per month, Va. Code Ann. § 18.2-308.2:2(Q) (Michie 1994), was "an effective means of disrupting the illegal interstate transfer of firearms." Weil & Knox, 275 JAMA at 1761. In fact, Virginia's "one-gun-a-month" law reduced by 66 percent the likelihood that a crime gun recovered in the Northeast corridor would be traced to a Virginia dealer. *See id.* at 1760. Further studies of this nature, showing the efficacy or ineffectiveness of gun regulations, will result from release of the information that ATF is withholding. *See* Jon S. Vernick, *et al.*, *Effects of Maryland's Law Banning Saturday Night Special Handguns on Crime Guns*, 5 Injury Prevention 259, 263 (1999) (using information from the Trace Database to determine that laws "[b]anning a specific class of handguns . . . can affect the type of gun used by criminals"). These studies will assist states considering laws like those in Maryland and Virginia.

c. ATF also withholds the serial numbers of guns involved in multiple sales for more than five years. Although ATF's declarant testified that "[o]nly 1.3% of the completed traces in the Trace Database . . . concern a firearm purchased as part of a multiple sale," J.A. 37, ATF's publications indicate that "20 percent of all handguns sold and traced in 2000" were "sold in multiple sales." ATF, *YCGII 2000* at ix. Because the serial number is the link between the Multiple Sales Database and the Trace Database, ATF's new policy is making it impossible for researchers to conduct analysis of recent data[13] to determine whether and how multiple sales contribute to gun trafficking and undermine public safety.

If ATF did not withhold serial numbers, independent researchers and gun violence prevention advocates could analyze whether multiple sale guns are disproportionately represented in the Trace Database; whether an association exists between the number of handguns purchased in a multiple sale and the likelihood that any of those guns will be recovered in a criminal investigation; and whether there is an association between the make, model, and type of handgun acquired in multiple purchases and guns recovered in criminal investigations.

When serial numbers are used in conjunction with dealer information (which ATF also withholds for more than five years), it is possible to assess the relationship between the gun dealer's business location, the average number of handguns purchased in multiple transactions from that dealer, and the frequency with which such dealer's guns appear in the Trace Database. Such analysis may reveal, for example, that certain dealers, such as those dealers located near major interstate highways, are more likely to be patronized by gun traffickers. Identifying such a relationship could help the public evaluate whether ATF properly allocates resources to monitor those dealers most likely to have sold large numbers of guns associated with crimes.

d. Finally, ATF withholds the date of the last retail sale for more than five years. The time period between the last retail sale and the date a gun is recovered in a crime (the "time-to-crime") can be a significant indicator of gun trafficking. A time-to-crime of less than three years strongly indicates that a gun was purchased with either criminal intent

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[13] ATF admittedly provides only data that it considers "stale." J.A. 34; Pet. Br. 9.

or intent to divert the gun. *See, e.g.*, ATF, *YCGII 2000* at 30 ("A short time-to-crime can be an indicator of illegal firearms trafficking."). Time-to-crime is even more important for firearms recovered from individuals younger than 25 years old, as there is a greater concentration of new guns used in crimes by youth. *See id.* at ix (finding that median time-to-crime for 18-24 year olds was 1 1/2 years shorter than for adults). By withholding the date of retail sale, ATF negates any possibility of independently assessing time-to-crime ratios, comparing those ratios across different regions of the country, or analyzing time-to-crime ratios pertaining to specific dealers or in specific locales. Independent researchers and gun violence prevention advocates need current time-to-crime data to assess whether ATF is properly focusing its resources.

SUMMARY OF ARGUMENT

FOIA requires public access to information held by government agencies. Exemptions from this general rule are available, but each requires an appropriate showing by the withholding agency. That showing must meet standards set forth in FOIA and explicated by this Court. Here, ATF seeks to withhold information from its Trace Database under Exemption 7(A) of the FOIA without coming close to meeting the established standards for such an exemption.[14]

First, ATF failed to demonstrate that the trace data it withheld related to an ongoing investigation. Exemption 7(A) was part of an amendment intended to overturn cases that allowed agencies to withhold records not related to any ongoing investigation. Consistent with Congress's purpose in enacting Exemption 7(A), this Court made clear in *Robbins Tire* that an agency seeking to withhold documents must demonstrate that those documents relate to an ongoing investigation. ATF's present policy for withholding trace data is heedless of this requirement. Instead, ATF asks the Court to endorse a new, categorical presumption that all investigations are ongoing for more than five years. Such a presumption would relieve ATF of the requirement that it demonstrate that withheld records relate to an ongoing investigation, and thereby reinstate the very cases that Exemption 7(A) was meant to overturn. ATF has failed to provide any evidence that suports this presumption, either by reporting the length of its own investigations, or by sampling the length of state and local investigations. To the extent such evidence exits, it reveals that 95 percent of ATF's investigations are closed long before five years have passed.

Second, even if ATF had somehow met the "ongoing investigation" requirement, it failed to demonstrate that release of the trace data at issue "could reasonably be expected to" disrupt any investigation. The District Court correctly determined that ATF's policy of withholding all trace data for over a year was not justified by any concrete risk of harm. Indeed, before ATF adopted its new withholding policy, it previously released the trace database information. Those releases did not result in interference in investigations, but rather in ground-breaking studies. Further, several law enforcement officials testified that the release of raw data from the Trace Database would not interfere with any investigations. In rebuttal, ATF provided only speculation—and not a single concrete example of interference.

ATF's policy of withholding certain categories of information for more than five years is even less defensible. ATF did not base the five-year period on any studies of actual or predicted harms that would flow from the release of trace data. Rather, ATF's proffered rationale was to prevent hypothetical interference with investigations of gun dealers. That concern is groundless, however, because ATF uses a special "do not contact" code for sensitive investigations of gun dealers, and none of those associated records were included in Respondent's request. Moreover, ATF's professed con-

[14] *Amici curiae* Brady Center, Educational Fund, and LCAV address only the second question certified by the Court, which concerns Trace Database information withheld under FOIA Exemption 7(A).

cern is belied by the fact that ATF itself has released several public reports identifying the names of dealers that are the sources of large numbers of traced guns. In this and other respects, ATF has not come close to meeting the standards consistently applied to the use of Exemption 7(A).

ARGUMENT

I. ATF Had The Burden Of Demonstrating That The Records Withheld Under Its Blanket Non-Disclosure Policies Could Reasonably Be Expected To Interfere With An Ongoing Law Enforcement Investigation.

Petitioner complains that the Court of Appeals "offered no persuasive ground for rejecting ATF's considered judgment" to deny the public access to all information in its Trace Database for 14-26 months and to deny access to some data for more than five years. *See* Pet. Br. 47. That complaint presumes a standard that FOIA's terms expressly reject. FOIA does not require a court to offer a "persuasive ground" for openness. On the contrary, FOIA forces agencies to justify secrecy. As this Court has explained, "[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, FOIA expressly placed the burden 'on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Department of Justice* v. *Reporters Comm. for Freedom of Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)).[15] Petitioner must overcome FOIA's

[15] Courts of Appeals in the Third and Seventh Circuits also hold that appellate courts should affirm district courts' decisions in FOIA cases unless: (1) the district court lacked an adequate factual basis for its determination, or (2) the district court's decision was clearly erroneous. *See, e.g., Sheet Metal Workers Int'l Ass'n* v. *Department of Veterans Affairs*, 135 F.3d 891, 896 & n.3 (3d Cir. 1998); *Solar Sources, Inc.* v. *United States*, 142 F.3d 1033, 1038 (7th Cir. 1998). This deferential standard appropriately acknowledges the district courts' proximity to the record in these typically fact-intensive cases. However, for the reasons discussed below, review under the *de novo* standard favored in the Second and D.C. Circuits would also confirm the District Court's determination that ATF cannot withhold the trace information under Exemption 7(A).

"strong presumption in favor of disclosure," *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978), and the reviewing court must construe any claimed FOIA exemption narrowly, *see Department of Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7-8 (2001).

II. ATF Failed To Satisfy Exemption 7(A)'s Requirement That It Prove The Data Withheld Relates To An Ongoing Investigation.

A. Exemption 7(A) And *Robbins Tire* Require An Agency To Show An Ongoing Investigation Or Enforcement Proceeding.

The District Court and the Court of Appeals correctly determined that ATF failed to meet its burden of demonstrating that its 14-26 month and five-year secrecy policies fell within the terms of Exemption 7(A). That exemption allows an agency to withhold law enforcement records or information that "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). Exemption 7(A) was enacted in 1974 as part of an amendment to FOIA that was intended specifically to reverse several cases that allowed agencies to withhold investigative records without demonstrating that an investigation or enforcement action was still ongoing. *See Robbins Tire*, 437 U.S. at 227-29 (citing floor comments by Senator Hart, the amendment's sponsor); *see also id.* at 230 ("As Congressman Moorhead explained to the House, the Senate amendment was needed to address 'recent court decisions' that had applied the exemptions to investigatory files 'even if they ha[d] long since lost any requirement for secrecy.'") (alteration in original) (citation omitted); *id.* at 232 (stating that the identical American Bar Association proposal was intended to indicate that once

an investigation is over there "would no longer be an interference with enforcement proceedings and there ought to be disclosure").[16]

Despite Congress's clear intent to require that an agency invoking Exemption 7(A) prove the existence of an ongoing investigation or enforcement proceeding, ATF has failed to point to a single ongoing investigation to justify its withholding policies. *See* Pet. App. 7a ("ATF failed to identify any particular ongoing investigations . . . ."). Even if ATF had done so, it would have had the additional burden of showing how the requested disclosures would have hampered those investigations. *See infra* Part III.

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[16] Petitioner tries to make much of the fact that in 1986 Congress amended Exemption 7(A) to substitute "could reasonably be expected to" for "would" as a standard for the risk of harm. *See* Pet. Br. 36 & n.19. However, Petitioner's discussion of the legislative history fails to note: (1) that the amendment's sponsors cited with approval a Congressional Research Service study which concluded that the change "would not seem to materially alter the construction that the courts have already given to the provision"; and (2) that one of the sponsors stated, with regard to an identical change to Exemption 7(C), that "the courts will recognize this change as simply codifying their present objective approach to assessing the degree of risk, *rather than calling for a departure to a less rigorous standard*." 132 Cong. Rec. S14270, S14299 (daily ed. Sept. 30, 1986) (reprinting Memorandum from American Law Division, Congressional Research Service, to House Government Operations Committee, Subcommittee on Government Information, Justice, and Agriculture (Feb. 18, 1986)); 132 Cong. Rec. S16489, S16496 (daily ed. Oct. 15, 1986) (statement of Sen. Leahy) (emphasis added). As the First Circuit observed in a case quoted by Petitioner, *Curran* v. *Department of Justice*, 813 F.2d 473, 474 n.1 (1st Cir. 1987), the "new (slightly more relaxed) phraseology" was a "relatively minor" change. More fundamentally, the change cannot be read to relieve Petitioner of the burden of pointing to an actual, ongoing investigation that disclosure "could reasonably be expected to interfere with." Such a reading would have the practical effect of reinstating the very case law that Exemption 7(A) was designed to reject, and would do so despite the lack of any indication that adding a reference to reasonableness was intended to reverse, rather than slightly modify, the 1974 amendment.

Petitioner argues that the following language in this Court's *Robbins Tire* decision somehow excuses its failure to identify any ongoing investigations:

> We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records *while a case is pending* would generally 'interfere with enforcement proceedings.'

Robbins Tire, 437 U.S. at 236 (emphasis added), *cited at* Pet. Br. 36. But *Robbins Tire* does not endorse Petitioner's policy. The very language cited by Petitioner emphasizes the need to show that disclosure would occur "*while a case is pending*." *Id.*; *see also id.* at 232 (referring to "an actual, contemplated enforcement proceeding"). The existence of an open investigation—which ATF has not shown here—is a *sine qua non* for any general policy of restricting access regarding that investigation. Any doubt on the issue was resolved by this Court's statement that

> where an agency fails to "demonstrat[e] that the . . . documents [sought] relate to any ongoing investigation or . . . would jeopardize any future law enforcement proceedings," Exemption 7(A) would not provide protection to the agency's decision.

Id. at 235 (quoting 1975 Source Book 440 (remarks of Sen. Kennedy)) (alterations in original). As the Fifth Circuit observed shortly after this Court handed down *Robbins Tire*, "the [*Robbins Tire*] Court placed great emphasis on the existence of an actual, ongoing labor enforcement proceeding." *Pacific Molasses Co.* v. *NLRB*, 577 F.2d 1172, 1184 & n.9 (5th Cir. 1978) (holding that prohibiting disclosure does not serve the purpose of Exemption 7(A) if no investigation or enforcement proceeding is underway).

B. ATF Failed To Demonstrate That The Requested Data Would Affect An Ongoing Investigation Or Enforcement Proceeding.

Petitioner has not demonstrated any practical need for this Court to depart from *Robbins Tire* and create a new rule relieving it from the burden of pointing to an ongoing investigation. Although ATF's new policy is to withhold *all* data from the Trace Database for 14-26 months and then to continue withholding several important categories of information for more than five years, ATF has offered no evidence of a single ongoing case that would be affected by release of this information before these periods expire.

This refusal to offer evidence of investigations must be considered in light of the fact that ATF, as the agency responsible for firearms tracing and investigations, had a cornucopia of relevant information available to it. If releasing trace data before the passage of 14-26 months or more than five years were reasonably likely to interfere with an actual, ongoing investigation, demonstrating that fact would not have been difficult.

For example, ATF had access to several surveys it had commissioned that contained all the necessary information concerning its own investigations involving gun traces. *See, e.g.*, ATF, *Following the Gun* (surveying characteristics of ATF's firearm investigations in 1996-1998). As ATF's own witness affirmed, ATF knows when it has closed the investigations associated with the traces it initiates. J.A. 150-151. ATF could have used this readily available information from its own activities to demonstrate the average length of its investigations, whether any investigations are still ongoing after 14-26 months or more than five years, and whether any would be disrupted by release of the trace data at issue here.

ATF also had contact information for each law enforcement agency that requested a trace. In an effort to meet its burden of producing evidence that investigations characteristically last more than five years and would be disrupted by

release of the trace data at issue, ATF could have selected a random sample of trace records and contacted the corresponding law enforcement agencies to determine whether the investigation was still ongoing and would be disrupted by release of information in that record. Such selection of a random or representative sample from voluminous records is a very common practice in FOIA cases. *See, e.g.*, *Bonner* v. *Department of State*, 928 F.2d 1148 (D.C. Cir. 1991) (discussing representative sampling); *Meeropol* v. *Meese*, 790 F.2d 942 (D.C. Cir. 1986) (discussing random sampling); *Weisberg* v. *Department of Justice*, 745 F.2d 1476, 1490 (D.C. Cir. 1984) (discussing representative sampling). Nevertheless, ATF chose not to produce such evidence.

Having failed to produce the necessary evidence, ATF now petitions this Court to accept on faith that its blanket withholding periods are reasonable. In effect, ATF seeks a new and irrebuttable presumption that its investigations are ongoing. Moreover, it seeks this presumption without pointing to a single ongoing investigation (much less a majority of investigations) to demonstrate, as is required for categorical rules under FOIA, that the information "fits into a genus in which the balance characteristically tips in one direction." *Reporters Comm. for Freedom of Press*, 489 U.S. at 776. As this Court observed when requested to adopt a similarly broad presumption of confidentiality under Exemption 7(D), such a rule "undoubtedly would serve the Government's objectives and would be simple . . . to administer. But [the Court is] not free to engraft that policy choice onto the statute that Congress passed." *Department of Justice* v. *Landano*, 508 U.S. 165, 181 (1993). Rather, the Court must begin with a presumption of disclosure and alter course only after a proper showing by the agency.

C. ATF's Own Reports Refute That Five-Year-Old Trace Data Characteristically Relates To An On-going Investigation.

It is difficult to reconcile the wealth of relevant information on investigations at ATF's disposal with its refusal to marshal any evidence concerning any ongoing investigations without resort to one of two conclusions. Either ATF depended exclusively on receiving deference not contemplated in the FOIA statute, or it believed that the available information on investigations would not support its decision to withhold information for more than five years. A look at one of ATF's own reports provides support for the latter conclusion. In 2000, ATF released a study of 1530 investigations that it initiated between July 1996 and December 1998. *See* ATF, *Following the Gun*. It stated that in March 2000, only 77 of those 1530 investigations (or 5 percent) were still ongoing. *Id.* at 31. In other words, 95 percent of ATF's investigations were completed before 15 to 44 months had passed. Those figures demonstrate that ATF could never meet its burden of demonstrating that five-year-old trace information characteristically relates to an ongoing investigation. A sampling of traces requested by local law enforcement would be even less likely to justify ATF's five-year secrecy policy, for ATF's own gun trafficking investigations may well last longer than local investigations. *Cf.* Pet. Br. 10.

The same figures indicate that there is a host of specific and identified trace information that ATF is fully aware no longer relates to any ongoing investigation. *See* ATF, *Following the Gun* at 31. Yet ATF refuses to release even this information relating to the 95 percent of its own investigations that are closed before the expiration of five years. This constitutes a specific and easily segregable instance where upholding ATF's five-year secrecy policy would thwart Congress's purpose in enacting Exemption 7(A). ATF's position would return FOIA to the pre-1974 days when law enforcement records could be withheld even when they did not relate to an ongoing investigation.

III. Release Of The Trace Data At Issue Could Not Reasonably Be Expected To Interfere With An Ongoing Investigation.

Even if ATF had succeeded in demonstrating that the withheld trace data relates to investigations that are still ongoing, it failed to offer persuasive evidence that release of the raw trace data at issue "could reasonably be expected to" disrupt any of those investigations. 5 U.S.C. § 552(b)(7)(A).

A. ATF's Blanket 14-26 Month Withholding Policy Is Not Justified.

The District Court and the Court of Appeals recognized that ordering release was appropriate because ATF's speculation regarding the potential disruption to investigations was undercut by: (1) the remaining protections against interference with investigations; (2) ATF's previous experiences with releasing the trace data it now withholds; and (3) law enforcement officers' opinions that release of raw trace data would not interfere with their investigations.

First, the District Court and Court of Appeals correctly understood that, contrary to ATF's characterizations, their decisions regarding Exemption 7(A) would not result in a "blanket release" of sensitive trace data. The City of Chicago did not request any fields in the Trace Database that contained investigative or administrative notes. Indeed, the Court of Appeals expressly relied on the fact that "any highly sensitive traces are coded and were not included in the City's FOIA requests." Pet. App. 9a. Petitioner discounts this finding by claiming that the sensitive traces, which are coded "do not contact," are "relatively rare," and that these codes are used to avoid alerting gun dealers that they "may be suspected of being involved in criminal activity."[17] Pet. Br. 35

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[17] ATF actually has at least two methods for ensuring that a gun dealer is not alerted that it is the subject of an investigation. First, as noted above, an agency can code its trace request "do not contact." Sec-

n.18. But ATF cannot deny that this coding undercuts all of its speculation (Pet. Br. 42, 44) that release of the remaining data could somehow alert a gun dealer that it is being investigated for illegal trafficking. Every data entry that states that there is an ongoing investigation of a gun dealer was excluded from the FOIA request at issue here. For the same reason, the exclusion from the request of this coding also undercuts ATF's stated concern about interfering with undercover investigations of gun dealers. *See* J.A. 35-36.

Second, ATF's experience releasing trace data and information from gun dealer records confirms the District Court's and Appeals Court's determinations. The uncontroverted record shows that ATF has, in the past, released the same type of trace data that it is now withholding from Respondent. ATF released such trace data to: (1) the Atlanta Journal-Constitution, *see* J.A. at 79, and (2) the NRA, *see* J.A. at 76-77, 93-101. In addition, in March 1995 ATF responded to a FOIA request by providing the Brady Center with the same type of trace data that it is now withholding. *See* Weil & Knox, 275 JAMA at 1759. Despite these past releases of the Trace Database, ATF has not been able to point to one investigation that has been jeopardized. Indeed, Special Agent Nunziato, who worked at ATF for 29 years and supervised ATF's National Tracing Center for seven years, confirmed that he did "not recall any investigations or prosecution either by ATF or a state or local law enforcement agency that was damaged or adversely affected by the disclosure of information from the [Trace Database]." J.A. 85.

The Court of Appeals also relied on the testimony of several experienced law enforcement officials who stated that

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ond, "[i]f ATF or another agency does not want a specific dealer to know that its gun is being traced, ATF will not even enter the name or dealer number into the [Trace Database]." J.A. 89. Release of the information requested here will not affect either form of protection.

release of raw trace data would not compromise any investigations. *See* Pet. App. 9a. These included:

- Special Agent Nunziato, who served at ATF for over 29 years, and served as head of ATF's National Tracing Center from 1991 to 1998, who stated that ATF's concerns about potential interference are "unfounded." J.A. 83. Special Agent Nunziato also stated that "the raw data itself would in no way suggest the existence or direction of an investigation." J.A. 86.
- Mr. Solomon, the Camden County Prosecutor, who stated that "Camden County does not believe that the release of this data will impede ongoing criminal investigations," and "the public disclosure of such information will not affect a local investigation." J.A. 66.
- Deputy Chief Hall, of the Detroit Police Department, who stated that "[t]he public release of the raw data itself would be unlikely to cause interference with law enforcement activities because the Detroit Police Department would not allow members of the public to know any more about whom we are investigating and the direction of our investigation than they could learn from what is already available in the media." J.A. 69.
- Colonel Roth, President of the St. Louis Board of Police Commissioners, who stated that "release of the ATF raw data in gross is unlikely to cause interference with law enforcement activities." J.A. 110.
- Deputy Superintendent Radney, the Chicago Police Department's officer in charge of investigations and former Commander of the Gangs Investigation Section (which included the Department's gun law enforcement unit), who stated that "it is difficult to imagine a scenario where the disclosure of the raw data itself concerning what companies sold the gun

and what individual made the initial purchase from which gun dealer would threaten our investigation." J.A. 62.

This testimony provides additional assurance that the District Court did not err in its factual determination that release of information from the Trace Database is not likely to disrupt any investigations.

B. Release Of Certain Categories Of Trace Data Before The Passage Of More Than Five Years Could Not Reasonably Be Expected To Interfere With Any Investigations.

Petitioner's speculation about interference becomes especially far-fetched when applied to each of the data fields of information that ATF now seeks to withhold for *four additional years* after its blanket 14-26 month waiting period has expired. This new five-year withholding policy is ATF's most arbitrary and least defensible—and it is the most disruptive to researchers' efforts to learn and report on whether Congress and ATF are enacting and enforcing the nation's gun laws in the public's interest.

The data fields that ATF now withholds for more than five years (in addition to the numerous administrative and investigative fields that were not requested and the fields that ATF withholds forever) fall into the following categories:

- Information identifying the requesting agency, including: (1) the agency's "ORI Code"; (2) agency name; and (3) agency contact information (street, city, zip, phone number);
- Information associated with the FFLs that manufactured, sold, or imported the gun, including: (1) the full FFL numbers; (2) "Invalid FFL" (associated with a governmental seller) numbers and contact information (street, city, zip, phone number); and (3) importer information;

- Gun serial number if the gun was involved in a multiple sale;
- Date of purchase.

J.A. 34; Pet. Br. 8-9. Researchers and the public need timely access to this information because it reveals how agencies are enforcing gun laws, how particular gun importers or dealers are operating, and conveys important time-to-crime statistics.

The importance of this information became evident when it was released in the past. As noted above, in 1995-96 the Brady Center's researchers used the same type of trace data that ATF is now withholding to produce a prominent article in a peer-reviewed journal demonstrating that a Virginia law prohibiting more than one handgun purchase per month was "an effective means of disrupting the illegal interstate transfer of firearms." Weil & Knox, 275 JAMA at 1761.

In spite of the demonstrated benefits of releasing the data at issue in a timely manner, ATF adopted its current five-year withholding policy sometime after 1995. As noted above, the uncontroverted record demonstrates that ATF's new five-year withholding policy was not devised in response to any harms that flowed from the prior information releases. Moreover, ATF's witness confirmed that the change was based on absolutely no studies of potential harms. *See* J.A. 168 ("THE COURT: . . . You are speculating. I mean, no studies have been done? A[nswer]: Correct, no studies have been done.").

When questioned, the only rationale that ATF could point to for its new five-year secrecy policy was "the statute of limitations for the Gun Control Act." J.A. 170. That answer reveals, in two important ways, that ATF's new secrecy policy was settled upon arbitrarily, without any regard for the likelihood of disclosures interfering with either local or federal investigations. On one hand, the fact that ATF relied only on the limitations period for the federal Gun Control Act, which ATF is charged with enforcing, demonstrates that

ATF was not adopting its policy out of concern for interference with local investigations. But on the other hand, ATF cannot use the limitations period for its own investigations to justify a *blanket* policy of nondisclosure, because ATF knows precisely when its own investigations close.

All that ATF is left with to justify its arbitrary five-year secrecy policy for each category of data is a bundle of post-hoc conjectures. Most of these conjectures fall apart under scrutiny; the rest are at odds with Exemption 7(A)'s "reasonably likely" standard.

1. Requesting agency information. Petitioner contends that information about the law enforcement agency that requested a trace (its "ORI code," name, street, city, phone number, and zip code) must be withheld for more than five years in all cases because it "may give criminals an enhanced understanding of the nature of the investigation, including the possible identities of undercover officers." Pet. Br. 43. This fear is based on the ATF witness's speculation that a criminal could learn of the existence of an investigation by combining data identifying an agency with other data identifying the "make, model, and serial number" of a traced gun. J.A. 35. The ATF witness hypothesizes that a gun dealer who sells to an undercover police officer could divine that it is under investigation by learning that the Ohio rather than the Detroit police were running traces on the guns it sold. J.A. 35-36.

This speculation must be considered in light of the fact that interference with an investigation would have to depend upon a procession of *all* the following unlikelihoods: (1) The gun is not among the 70 percent associated with an individual who knows of the pendency of an investigation, *see* Pet. Br. 41; *and* (2) the investigation is one of the small percentage that relate to gun dealers;[18] *and* (3) the investigation is

[18] *See* Pet. Br. 45 n.22 ("[W]hile [manufacturers, wholesalers, and retailers] are *occasionally* participants in criminal wrongdoing, they are scarcely the *primary* threat to the integrity of the underlying law enforcement investigations.").

still ongoing up to five or six years later, despite the evidence noted above that at least 95 percent of investigations close much sooner; *and* (4) for some reason the agency fails to mark this sensitive trace "do not contact," even though it knows the identity of the undercover police officer who purchased the gun and thus has no need to contact the dealer; *and* (5) the gun dealer is not already aware that it may be under investigation for having sold numerous traced guns, even though the dealer was contacted in the normal tracing process for each of the disclosed traces; *and* (6) somehow the fact that Ohio rather than Detroit police requested the trace does cause the dealer to deduce that it may be the subject of an investigation; *and* (7) this deduction causes it to disrupt the longstanding investigation. If the remote probability of this long chain of coincidences satisfies Exemption 7(A)'s "reasonably likely" standard, it is difficult to see how release of any law enforcement records could ever be required.

2. Information that could be used to discern the identity of any FFL that manufactured, imported, or sold a gun. ATF withholds the rest of the categories of data for more than five years to prevent a requestor from obtaining the full FFL numbers of the manufacturer, importer, wholesaler, or dealer of a gun that is traced. These categories include: (1) the manufacturer, importer, wholesaler, and dealer's full FFL numbers; (2) any Invalid FFL numbers (associated with a governmental seller) and contact information; (3) importer name, if the FFL is an importer; (4) serial numbers of guns involved in multiple sales (in order to prevent anyone from obtaining the associated dealer information from the Multiple Sales Database);[19] and (5) the date of the gun purchase.[20]

[19] *See* J.A. 37 ("If the serial numbers of [guns involved in multiple sales] were released prior to five years after the date of the trace, then non-law enforcement personnel would have enough information to iden-

ATF claimed it was concerned that disclosing the FFL identity, when combined with information like the serial numbers of traced firearms, "would allow third parties not involved in the specific law enforcement investigation in question to 'connect the dots' and potentially compromise such an investigation, especially where the FFL is suspected of wrongdoing (e.g., illegal trafficking)." J.A. 41-42.

ATF's professed concern about the public or press contacting suspicious gun dealers rings hollow because ATF itself has issued several public reports identifying the names of dealers who are the sources of large numbers of traced guns. *See, e.g., Tucson Study*; *Project Lead*. Its putative concern about alerting FFLs to investigations also falls apart under scrutiny. On the one hand, if a law enforcement agency does not wish a suspect FFL to know about a trace run on a weapon it sold, the trace record is marked "do not contact," and such records are neither requested nor released. On the other hand, if for some reason the trace request is not marked "do not contact," then the FFL has necessarily been contacted during the tracing process and is fully aware of the number of traces run on the guns it has sold. In such a situation, third parties reviewing trace data cannot alert the FFL to anything it does not already know.[21]

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tify FFLs involved in a firearms trace before the expiration of the five-year period established by ATF.").

[20] *See* J.A. 45 ("The purchase date of the firearm is withheld because, in combination with the data released under FOIA such as make, model, and serial number of the traced firearm(s), the date could easily identify the FFL who sold a firearm.").

[21] Moreover, every gun dealer in the country was put on notice by the President that it will be subject to special scrutiny by the ATF if it has sold ten guns that are traced in a year. *See* Announcement on Gun Industry and Illegal Trafficking, The White House, *President Clinton Announces Landmark Report on Gun Industry and Bold Actions to Crack Down on Illegal Trafficking* (Feb. 4, 2000), *available at* 2000 WL 132568, at *2 ("ATF will conduct focused inspections of the 1,000 gun dealers who had 10 or more crime guns traced to them in 1999. ATF will also require the 450 current dealers that had 10 or more crime guns traced to them with a 'time-to-crime' of less than three years from the original sale to provide ATF with information on all used guns offered for sale.").

In sum, these various conjectures that ATF offered to support its five-year withholding policy do not demonstrate anything approaching a "reasonable likelihood" that interference with an investigation would follow release of the trace data at issue. The Court of Appeals was correct to reject ATF's arbitrary secrecy policies.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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